United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Signed

74-1505 74-1529

Nos. 74-1505 and 74-1529

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LOIS F. WEINER,

Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

WALTER H. WEINER,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISIONS OF THE
UNITED STATES TAX COURT

BRIEF FOR THE COMMISSIONER

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court correctly held that certain payments made by Walter to Lois, pursuant to a separation agreement, represented a property settlement rather than alimony, and were therefore not taxable to Lois under Section 71, nor deductible by Walter under Section 215 of the Internal Revenue Code of 1954.

2. Whether the Tax Court properly denied Walter Weiner's post-decision motion, which raised the alternative theory that he was entitled to a deduction for a portion of these payments as imputed interest under Section 483 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

These consolidated appeals involve deficiencies in federal income taxes asserted against Walter H. Weiner for the year 1965 in the amount of $934.15, and against Lois F. Weiner for the years 1965 and 1966 in the total amount of $1,121.11. (Op. 2.)[1/] Both Walter Weiner and Lois Weiner, formerly husband and wife, petitioned the Tax Court to review the asserted deficiencies. The cases were consolidated for trial. On November 1, 1973, the Tax Court filed its findings of fact and opinion,[2/] holding in favor of Lois Weiner and against Walter Weiner, and on November 5, 1973, the Tax Court entered its decisions accordingly. On November 26, 1973, Walter Weiner filed a motion seeking to redetermine the deficiency, which motion was denied by the Tax Court on

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1/ References are to the documents comprising the original record on appeal as transmitted to this Court by the Clerk of the Tax Court.

2/ The Tax Court's findings of fact and opinion are reported at 61 T.C. 155.

January 2, 1974. Walter Weiner then filed a timely notice of appeal on April 1, 1974. The Commissioner filed a protective appeal against Lois Weiner on February 1, 1974. Jurisdiction is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts in this case, as stipulated by the parties and found by the Tax Court, may be summarized as follows:

In 1958, Walter and Lois Weiner (hereinafter "Walter" and "Lois") decided to purchase a house. This decision was based primarily on the advice of Lois' doctors that continued apartment dwelling in New York City might impair her mental health.[3/] Lois' mother agreed to provide them money for a down payment by arranging for a transfer from the family trust to Lois of stock worth $29,500. Although this was accomplished by means of a note executed by Lois to the trust, the transfer was, in fact, an advance against any inheritance Lois would receive if she survived her mother. (Op. 3-4; Stip. Ex. II(e) and (g).)

In 1958, Lois and Walter purchased a house costing $37,500. Of the $29,500 received from the trust, $25,000 was used as a down

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3/ Throughout their marriage Lois was hospitalized for substantial periods of time due to mental illness. In order to defray the large expenses incurred because of her illness, Lois' family gave the couple frequent and substantial gifts of money and stock. (Op. 3.)

payment, with the remainder being used for moving and other similar expenses. Title to the house was placed in the joint names of Walter and Lois. (Op. 4.)

In March of 1965, Walter and Lois entered into a separation agreement, which was subsequently incorporated into a divorce decree entered later that month. In paragraph 2 of that agreement, Lois conveyed her interest in the house to Walter, who also retained custody of their two children. (Op. 4; Stip. Ex. I, pp. 1-2.)

Paragraph 3(a) then provided that "the Wife will require $200 a month from the Husband for her support and maintenance * * *." In addition, it was agreed that "supplementary payments over a period of several years shall be made by the Husband to the Wife in order to help defray the relatively substantial disbursements which the Wife may make in paying certain extraordinary current expenses and in establishing a residence separate from that of the Husband and the Children." In contemplation of the foregoing, Walter agreed to make, and Lois agreed to accept, "in full satisfaction of her rights during her life to support and maintenance from the Husband, the following periodic payments": (i) $200 per

month until Lois shall die or remarry; and (ii) $400 per month until the payments total $29,000.[4/] (Op. 5; Stip. Ex. I, pp. 3-4.) The Tax Court found that the contemplated payment of $29,000 was not a coincidence, but rather a definite attempt to pay Lois for her property rights in the home kept by Walter. (Op. 9.)

Paragraph 3(b) provided that Walter's obligation to make the payments in paragraph 3(a) were not to extend beyond Lois' lifetime. (Op. 5; Stip. Ex. I, p. 4.)

While negotiating the separation agreement, Lois' attorney advised her that because of the way in which the agreement was written, she might be taxable on the payment of the $29,000. At that time, however, Lois was a voluntary patient at a hospital and felt that she had to accept the agreement as it stood in order to get a divorce. (Op. 6.)

During 1965, Walter paid Lois $6,000, all of which he deducted as alimony on his 1965 federal income tax return. Lois reported $2,000 ($200 per month, beginning with their divorce in March of 1965) as income from alimony payments on her 1965 federal income tax return. In 1966, Walter made payments of $4,800 to Lois which he deducted as alimony. Lois reported $2,400 as income from alimony on her 1966 return.

4/ With respect to paragraph 3(ii), the agreement provided that if Walter's income diminished or the financial requirements of the children would be impaired by these additional monthly payments of $400, Walter could reduce them to $200, in which case Lois would continue to receive additional payments pursuant to this subparagraph until the total payments reached $29,000. (Op. 5.)

With respect to Walter, the Commissioner determined that $4,000 of the $6,000 he paid to Lois in 1965 did not constitute deductible alimony payments because they were not made to discharge any legal obligation arising out of the marital or family relationship.[5/] To protect the revenue, the Commissioner also asserted deficiencies against Lois, based on the admittedly inconsistent position that these payments were alimony and thus taxable to her.

The Tax Court held that the payments in question were in the nature of a property settlement, rather than alimony, and therefore not taxable to Lois, nor deductible by Walter. (Op. 11.) After the Tax Court entered its decisions, Walter filed a motion for recomputation of deficiency (filed as Motion to Vacate Decision), asserting the alternative argument that if, as the Tax Court indicated, the payments were for Lois' equity in the house, then a portion of the payments were deductible as "imputed interest" pursuant to Section 483 of the Internal Revenue Code. The Tax Court denied this motion on the ground that the alternative theory was not timely raised. These appeals followed.

5/ No deficiency was asserted against Walter for 1966, since even without deduction of the payments in issue, Walter would incur no tax liability. (Op. 6.)

SUMMARY OF ARGUMENT

This case presents first, the familiar question whether certain payments by a husband to his former wife constitute alimony, which is taxable to the wife, and deductible by the husband, under Sections 71 and 215 of the Internal Revenue Code of 1954. On the other hand, if the payments, albeit periodic, represent a division of marital property, such payments are tax-free to the wife, and nondeductible by the husband. The Government is essentially in the position of a stakeholder on this issue, since both the husband and wife are parties to the proceeding.

The resolution of this question depends upon the substance of the agreement and the intent of the parties, rather than on its labels or other formal provisions. Under their separation agreement, Walter retained the family house, which had been purchased with $29,500 of Lois' money. The agreement also provided that he would pay Lois, in addition to $200 per month for her support, supplementary payments of $400 per month until a total of $29,000 had been paid. On these facts, the Tax Court's conclusion that the supplementary payments on the $29,000 obligation represented a property settlement, rather than alimony, was clearly reasonable. The law is clear that payments attributable to property which originally belonged to the wife are not within the purview of Sections 71 and 215.

The Tax Court properly denied Walter's post-decision motion seeking, alternatively, to deduct a portion of the payments as imputed interest under Section 483 of the Code. Surely, the Tax Court's statement in the opinion that the payments were for Lois' equity in the house does not amount to the "extraordinary circumstances" required to reopen the case for consideration of a new issue.

In any event, the Government maintains that Section 483, which imputes an interest element to many deferred installment payments where no interest is specified, does not apply to the payment of obligations incurred under a financial settlement in connection with a divorce. Section 483 applies only where there is a "contract for the sale or exchange of property" and only to "payments that constitute part or all of the sales price." A wife's receipt of property which was originally hers is clearly not "a sale or exchange of property." Moreover, the history of Section 483 makes it clear that it was enacted to prevent the conversion of interest income into capital gain in response to transactions taking the form of interest-free sales in which the seller always, and the buyer very often, stood to profit at the expense of the revenues. Applying this provision to divorce settlements would not only distort Section 483 beyond its plain function, but also would distort the specific divorce provisions of Sections 71 and 215.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT WALTER WAS NOT ENTITLED TO A DEDUCTION FOR THE SUPPLEMENTARY PAYMENTS HE MADE TO LOIS UNDER THEIR SEPARATION AGREEMENT, EITHER AS ALIMONY OR, IN THE ALTERNATIVE, AS IMPUTED INTEREST UNDER SECTION 483

A. Introduction

Pursuant to a separation agreement, which was subsequently incorporated into their divorce decree, Walter agreed to pay Lois $200 per month "for her support and maintenance," and supplementary payments of $400 per month--until such payments totalled $29,000--to help her meet certain extraordinary current expenses, including establishing a new residence for herself. As part of the consideration for the agreement, Lois conveyed to Walter all her interest in their house. Title to the house was held jointly, but in order to purchase it, Lois had obtained an advance of $29,500 against her inheritance.

The initial question, and the only question presented to the Tax Court prior to its decision, was whether the supplementary monthly payments on the $29,000 obligation constituted alimony, taxable to Lois under Section 71, and deductible by Walter under Section 215.

In a post-decision motion, Walter raised an alternative issue--in view of the Tax Court's conclusion that the payments

represented payment for Lois' equity in the house, rather than alimony--i.e., whether a portion of these payments was deductible by him as imputed interest under Section 483.

B. Periodic payments in division of marital property do not constitute alimony

The federal income tax treatment of payments involving alimony or support as between divorced or legally separated spouses is set forth in Sections 71 and 215 of the Internal Revenue Code of 1954, Appendix, infra. Section 71(a)(1) provides that if a wife is divorced or legally separated from her husband under a decree of divorce or separate maintenance, her gross income includes "periodic payments" received in discharge of a legal obligation which, because of marital or family relationship, is incurred by the husband under the decree or a written instrument incident to the divorce. Subsection (c)(1) of Section 71, however, excludes from the definition of "periodic payments," installment payments discharging a part of an obligation, the principal sum of which is specified in the qualifying instrument. Subsection (c)(2), in turn, limits subsection (c)(1) by providing that if the terms of the instrument allow the principal sum to be paid over a period ending more than ten years from the date of the instrument, such installment payments will be treated as "periodic payments." The correlative

provisions of Section 215 permit a deduction to the husband only for amounts that are includible in the gross income of the wife under Section 71.

In the instant case, a principal sum ($29,000) was specified in the written agreement incident to the divorce decree, and that sum was payable over a period of less than ten years from the date of the instrument. Accordingly, it does not appear, as Walter asserts (Br. 10-11), that such installments on the principal sum should be considered "periodic payments" under subsection (c)(1).[6/]

In any event, Sections 71 and 215 require, in addition to being "periodic," that the payments be in discharge of a legal obligation imposed on the husband because of the marital or family relationship. The statutory predecessors of the present Sections 71 and 215 were added to the Internal Revenue Code of 1939 by the Revenue Act of 1942, c. 619, 56 Stat. 798. Congress' intent to limit these provisions to payments attributable to the maintenance and support of the wife, and not to her rights in property, was

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6/ While these payments would terminate upon the death of the wife, and could be extended if the husband's economic status changed, such payments will be considered periodic for purposes of Section 71(a), only if the further condition--that such payments are in the nature of alimony or an allowance for support--is also met. See Treasury Regulations on Income Tax (1954 Code), §1.71-1(d)(3)(i), Appendix, infra. This, of course, is the same condition which forms the basis of Section 71(a) itself.

plainly expressed (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 372, 428); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 84 (1942-2 Cum. Bull. 504, 568)):

> This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. This section does not apply to that part of any periodic payment attributable to any interest in the property so transferred, which interest originally belonged to the wife, unless she received it from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations.

Consistent with the statutory intent, Treasury Regulations, Section 1.71-1(b)(4) and 1.71-1(c)(4), Appendix, infra, provide that Section 71 applies only to payments made because of the marital relationship in recognition of the general obligation to support, and does not apply to that part of any periodic payment attributable to any interest in property transferred in discharge of the husband's obligation under the agreement, which interest originally belonged to the wife.

The courts too have clearly recognized that under the statute, Congress sought to permit "a divorced wife or husband to receive a division of capital tax free." McCombs v. Commissioner, 397 F. 2d 4, 7 (C.A. 10, 1968); Bardwell v. Commissioner, 318 F. 2d

786, 789 (C.A. 10, 1963). See also Lambros v. Commissioner, 459 F. 2d 69 (C.A. 6, 1972); Mills v. Commissioner, 442 F. 2d 1149 (C.A. 10, 1971); Houston v. Commissioner, 442 F. 2d 40 (C.A. 7, 1971).

Furthermore, as the Tax Court correctly observed (Op. 8-9), the labels attached to payments made in connection with divorces or separations are not controlling, especially when other provisions of the agreement make the matter equivocal. Bardwell v. Commissioner, supra; Mills v. Commissioner, supra. Rather, whether payments represent alimony or a property settlement depends upon the substance of the arrangement and the intent of the parties. Phinney v. Mauk, 411 F. 2d 1196 (C.A. 5, 1969); Mills v. Commissioner, supra.

In this connection, the Tax Court, citing its prior holdings in Gerlach v. Commissioner, 55 T.C. 156, 168-169 (1970), and Mirsky v. Commissioner, 56 T.C. 664 (1971), reiterated its position that the parol evidence rule of Commissioner v. Danielson, 378 F. 2d 771 (C.A. 3, 1967), and the "strong proof" rule of Schmitz v. Commissioner, 51 T.C. 306 (1968), 7/ should not apply to

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7/ The Danielson and Schmitz cases both dealt with contracts entered into between a buyer and seller specifying the portion of the purchase price which was to be allocated to a covenant not to compete and to other assets purchased. In Danielson, the Third Circuit held that in order for one of the parties to treat the allocation differently for federal tax purposes, he must adduce (p. 775) "proof which in an action between the parties to the

divorce settlements, because of the completely different nature of divorce or separation agreements as compared to business contracts. The Government has since acquiesced in those two decisions on this issue. See 1971-1 Cum. Bull. 2 (Gerlach, supra); 1972-2 Cum. Bull. 2 (Mirsky, supra).

Here too, as in Gerlach, supra, the agreement, read in its entirety, is not without ambiguity. To be sure, it classified both the payments provided for in subparagraphs 3(a)(i) and 3(a)(ii) as periodic payments in full satisfaction of her rights to support and maintenance. (Op. 5; Stip. Ex. I, p. 3.) The agreement also stated, however, that Lois only required $200 a month for her support and maintenance, i.e., the amount provided by paragraph 3(a)(i). In addition, paragraph 2 of the agreement provides that as part of the consideration therefor, Lois conveyed to Walter all her rights and interest in their house. Also contained in paragraph 2 is an agreement by Walter to provide

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7/ (continued)
agreement would be admissible to alter that construction or to show its unenforceability because of mistake, undue influence, fraud, duress, etc." In Schmitz, the Tax Court held that "strong proof" was required to overturn the parties' declarations in their contract.

for payment out of insurance on his life of the amounts due Lois under paragraph 3(a)(ii).[8]

In addition to the terms of the agreement itself, the Tax Court referred to other evidence of record to ascertain the intent of the parties. The $29,500 used to purchase the house, defray moving expenses and so forth, was clearly supplied by Lois, as an advance against her inheritance, and for which she demanded recompense throughout the divorce negotiations. (Op. 11; Stip. Ex. II(e) and (g).)

We think it was not unreasonable for the Tax Court to conclude that a property settlement was intended. This is indicated not only by the provision that Lois will receive only $200 per month for support, but also by the fact that the total payment she was to receive under subparagraph 3(a)(ii) approximated the amount of her money used to pay the bulk of the purchase price of the house, which she conveyed to Walter as partial consideration for the agreement.

Walter suggests on appeal (Br. 8, 13, 18) that since Lois' only contention throughout the trial was that the payments in question were repayment of a loan, the Tax Court's decision on

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8/ It should be noted that the payments under 3(a)(i) would terminate upon either Lois' death or remarriage, while the payments under 3(a)(ii) would terminate only upon her death. While the latter may be considered indicative of "periodic" payments, it clearly does not determine whether the payments represented alimony as opposed to a division of property. See also Phinney v. Mauk, supra; Riddell v. Guggenheim, 281 F. 2d 836 (C.A. 9, 1960).

a different basis, i.e., that the payments represented a property settlement, rather than alimony, should be reversed. We disagree. The essence of the Tax Court's decision is that the supplementary payments were not paid in discharge of an obligation arising out of the marital relationship, and therefore were not taxable to the wife, nor deductible by the husband, under Sections 71 and 215. In concluding that these payments were not alimony because they were in the nature of a property settlement, rather than a repayment of a loan, the Tax Court was simply applying the proper law--indeed, the same provisions of the Code (Sections 71 and 215) relied on throughout the case--to the facts as it found them. It is difficult to see how Walter was prejudiced by the alleged variance. See Commissioner v. Multnomah Operating Co., 248 F. 2d 661 (C.A. 9, 1957). The compelling fact remains that the $29,000 obligation represented property which "originally belonged to the wife." (Op. 8.) Plainly, such payments are not within the ambit of Sections 71 and 215. Treasury Regulations, §1.71-1(c)(4).

C. The Tax Court did not abuse its discretion in denying Walter's post-decision motion seeking alternative deductions under Section 483

In a motion filed after the Tax Court had entered its decision rejecting Walter's argument for a deduction under Sections 71 and 215, Walter claimed that, because the Tax Court characterized the payments to Lois as payment "for her equity interest in the house," the deficiency should be recomputed to allow Walter to deduct "imputed interest" on the exchange, pursuant to Section 483 of the Internal Revenue Code of 1954, Appendix, infra. In general, that section provides that in the case of a sale or exchange of property, where either no interest is specified or the stated interest is below the rate prescribed by the Treasury Regulations, a part of each deferred installment payment will be treated as interest.

As this Court has clearly held, a reviewing court may reverse a discretionary denial by the Tax Court of post-opinion motions only if there are shown to be "extraordinary circumstances" justifying reversal. Wilson v. Commissioner, 74-2 U.S.T.C., par. 9630 (C.A. 6, Aug. 6, 1974); Pepi, Inc. v. Commissioner, 448 F. 2d 141, 148 (1971). Such extraordinary circumstances, we submit, are not present here.

At the outset, Walter's claim seriously misconstrues the language of the Tax Court opinion. The Tax Court's observation (Op. 11) that the payments were to Lois "for her equity in the

house," is clearly not equivalent to finding that such payments were on account of "a contract for the sale or exchange of property," and that they constituted "part or all of the sales price," within the meaning of Section 483. Indeed, when read in the context of the whole opinion, the court's language indicates nothing more than a determination that the payments represented a division of marital property, or more particularly, a return to Lois of her money which was invested in the house. By his post-decision motion, Walter was simply trying to introduce an alternative theory, which was equally available to him throughout the trial of the case. See Mayer v. Higgins, 208 F. 2d 781 (C.A. 2, 1953); Commissioner v. Multnomah Operating Co., supra. This Court's conclusion in Pepi, Inc. v. Commissioner, 448 F. 2d 141, 148 (C.A. 2, 1971), applies with equal force here:

> Since the statements in the opinion not only do not amount to "extraordinary circumstances," but were quite appropriate in their context, the denial of the motion was not an abuse of discretion. Mayer v. Higgins, 208 F. 2d 781, 782-783 (2d Cir. 1953).

Even if Section 483 were timely raised, however, it would not apply to the payments in question. It is the Government's position that the financial settlement between Walter and Lois did not constitute a "contract for the sale or exchange of property," and, by the same token, that Walter's supplementary payments pursuant to the agreement were not "part or all of the sales price." Consequently, Section 483 would not be applicable to those payments.

From a realistic standpoint, a division of property between a separating husband and wife is quite different from a "sale or exchange of property," as that phrase is understood in its ordinary commercial context. This is particularly true where, as here, there was no negotiated "sale" or "sales price," taking into account any appreciation in value, current market conditions, etc. Rather, joint property was being divided so that the wife received as separate property, an amount approximating her original contribution.

Walter mistakenly relies (Br. 19-20) upon United States v. Davis, 370 U.S. 65 (1962), in his attempt to establish, as he must, that Lois engaged in a sale or exchange of property, and that he was making payments for the property sold or exchanged by Lois. In Davis, a husband transferred appreciated property in satisfaction of his wife's marital claims, and the Supreme Court held that the husband realized capital gain. It certainly did not hold that the wife sold or exchanged property, and indicated quite the contrary. Davis is only an application of the well-established rule that one who transfers appreciated property to satisfy, at its appreciated value, a monetary obligation will recognize gain to the extent of the appreciation. This is true whether the appreciated property is used to satisfy a legacy by

executors (Commissioner v. Brinckerhoff, 168 F. 2d 436 (C.A. 2, 1948), or to satisfy a gambling debt (United States v. Hall, 307 F. 2d 238 (C.A. 10, 1962), or as compensation for services (General Electric Co. v. United States, 299 F. 2d 942 (Ct. Cl., 1962), cert. denied, 371 U.S. 940 (1962)), or as in Davis, to satisfy marital obligations. In no case does this constitute a sale or exchange of the appreciated property by the recipient. Wilson v. Tomlinson, 306 F. 2d 103 (C.A. 5, 1962).

Moreover, because Sections 71 and 215 of the Internal Revenue Code provide specifically when payments incident to divorce are and are not taxable to the wife and deductible by the husband, those provisions, specifically applicable in the context of this case, are not overridden by the more general provisions of Section 483 in a fashion that would make taxable to the wife and deductible by the husband a part of the payments that would otherwise, under Sections 71 and 215, be completely tax-free to the wife and non-deductible by the husband. The legislative history of Section 483 indicates clearly that such a modification would distort Section 483 as well as Sections 71 and 215.

As the Committee Reports disclose, Section 483 was enacted because sellers and buyers of property had adopted the practice

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9/ S. Rep. No. 830, 88th Cong., 2d Sess., p. 102 (1964-1 Cum. Bull. (Part 2) 505, 606).

of providing for deferred payment without stated interest, or at very low rates of interest. The courts consistently refused to impute an interest element into such payments,[10/] even though the parties had, of course, been free to take into account the fact of deferral of payment in establishing the stated sales price. The result of such arrangements to the seller was to eliminate any interest from ordinary income, and increase by the amount that would have been interest his capital gain, taxable at more favorable rates. For the buyer, such an arrangement deprived him of the interest deduction he might otherwise have had, but there were other compensations. The enhancement of the stated sale price by the amount that would otherwise have been interest would permit an increased investment credit. If the property were depreciable, he could compute depreciation, often at accelerated rates, on the enhanced sale price. Accelerated depreciation on an enhanced sale price would often permit the buyer to take deductions for depreciation earlier than he would have been to take deductions for interest, had there been interest payments rather than an enhanced stated price. Or if the property constituted inventory to the buyer, the enhancement of price in lieu

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10/ See, e.g., United States v. Cornish, 348 F. 2d 175, 184 (C.A. 9, 1965).

of interest would at worst wash out as soon as inventory was sold, and at best permit a deduction through increased cost of goods even earlier than interest would have accrued or been paid on the deferred purchase price. The result of these and similar considerations was that both seller and buyer might obtain advantageous tax results from a nominally interest-free deferral of payment, and only the tax revenues would suffer. To frustrate such practices in the case of substantial sales of property with substantial deferral of payment, Section 483 was enacted in 1964.

As will be recognized, nothing in the considerations giving rise to Section 483 relates even remotely to financial settlement incident to divorce. Alimony is normally payable periodically, and gives rise to ordinary income to the divorced wife when received, and a deduction to the husband when paid. If, as in this case, a property settlement is made so that the wife is paid a fixed sum over a period of years for that interest in property which originally belonged to her, then the Congress has clearly indicated that such transfers shall be tax-free to the wife and nondeductible by the husband. To impute interest in such a case would expand Section 483 beyond its function as well as beyond its terms, and would substantially distort the legislative

treatment of marital settlements. In the only case where, to date, this precise question has been considered, the court concluded that Section 483, which was conceived in a commercial setting, should not affect marital property settlement agreements, which are unique in character and subject to very specialized sections of the Code. Fox v. United States, 33 A.F.T.R. 2d 1118 (E.D. Pa., March 25, 1974), appeal pending in C.A. 3.

CONCLUSION

For the reasons stated above, the decisions of the Tax Court [11] should be affirmed.

Respectfully submitted,

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NOVEMBER, 1974.

11/ In the event this Court should hold that any portion of the payments made are deductible by Walter, and reverse the decision in Docket No. 74-1529, the corresponding amount would be income to Lois, and the Court should likewise reverse and remand the decision in Docket No. 74-1505, as to which the Commissioner has taken a protective appeal.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing two copies thereof to each on this 4th day of November, 1974, in envelopes, with postage prepaid, properly addressed to each of them, respectively, as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

(a) General Rule.--

(1) Decree of divorce or separate maintenance.--If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written separation agreement.--If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

(3) Decree for support.--If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

* * *

(c) Principal Sum Paid in Installments.--

(1) General rule.--For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where period for payment is more than 10 years.--If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

* * *

SEC. 215. ALIMONY, ETC., PAYMENTS.

(a) General Rule.--In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

* * *

SEC. 483 [as added by Sec. 224(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19]. INTEREST ON CERTAIN DEFERRED PAYMENTS.

(a) Amount Constituting Interest.--For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of a payment to which this section applies which bears the same ratio to the amount of such payment as the total unstated interest under such contract bears to the total of the payments to which this section applies which are due under such contract.

* * *

(c) Payments to Which Section Applies.--

(1) In general.--Except as provided in subsection (f), this section shall apply to any payment on account of the sale or exchange of property which constitutes part or all of the sales price and which is due more than 6 months after the date of such sale or exchange under a contract--

(A) under which some or all of the payments are due more than one year after the date of such sale or exchange, and

(B) under which, using a rate provided by regulations prescribed by the Secretary or his delegate for purposes of this subparagraph, there is total unstated interest.

Any rate prescribed for determining whether there is total unstated interest for purposes of subparagraph (B) shall be at least one percentage point lower than the rate prescribed for purposes of subsection (b)(2).

* * *

(f) Exceptions and Limitations.--

(1) Sales price of $3,000 or less.--This section shall not apply to any payment on account of the sale or exchange of property if it can be determined at the time of such sale or exchange that the sales price cannot exceed $3,000.

(2) Carrying charges.--In the case of the purchaser, the tax treatment of amounts paid on account of the sale or exchange of property shall be made without regard to this section if any such amounts are treated under section 163(b) as if they included interest.

(3) Treatment of seller.--In the case of the seller, the tax treatment of any amounts received on account of the sale or exchange of property shall be made without regard to this section if no part of any gain on such sale or exchange would be considered as gain from the sale or exchange of a capital asset or property described in section 1231.

(4) Sales or exchanges of patents.--This section shall not apply to any payments made pursuant to a transfer described in section 1235(a) (relating to sale or exchange of patents).

(5) Annuities.--This section shall not apply to any amount the liability for which depends in whole or in part on the life expectancy of one or more individuals and which constitutes an amount received as an annuity to which section 72 applies.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.71-1 Alimony and separate maintenance payments; income to wife or former wife.

* * *

(b) Alimony or separate maintenance payments received from the husband--

* * *

(4) Scope of section 71(a). Section 71(a) applies only to payments made because of the family or marital relationship in recognition of the general obligation to support which is made specific by the decree, instrument, or agreement. Thus, section 71(a) does not apply to that part of any periodic payment which is attributable to the repayment by the husband of, for example, a bona fide loan previously made to him by the wife, the satisfaction of which is specified in the decree, instrument, or agreement as a part of the general settlement between the husband and wife.

* * *

(c) Alimony and separate maintenance payments attributable to property.

* * *

(4) Section 71(a)(1) or (2) does not apply to that part of any periodic payment attributable to that portion of any interest in property transferred in discharge of the husband's obligation under the decree or instrument incident to the divorce status or legal separation status, or transferred pursuant to the written separation agreement, which interest originally belonged to the wife. It will apply, however, if she received such interest from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations.

* * *

(d) Periodic and installment payments.

* * *

(3) (i) Where payments under a decree, instrument, or agreement are to be paid over a period ending 10 years or less from the date of such decree, instrument, or agreement, such payments are not installment payments discharging a

part of an obligation the principal sum of which is, in terms of money or property, specified in the decree, instrument, or agreement (and are considered periodic payments for the purposes of section 71(a)) only if such payments meet the following two conditions:

(a) Such payments are subject to any one or more of the contingencies of death of either spouse, remarriage of the wife, or change in the economic status of either spouse, and

(b) Such payments are in the nature of alimony or an allowance for support.

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